

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SHANNON K. BROWN**

Claimant

VS.

**FINEST FOOD SERVICE d/b/a/ BAGEL & BAGEL**

Respondent

AND

**FIREMAN'S FUND INSURANCE COMPANY**

Insurance Carrier

Docket No. 213,792

**ORDER**

Respondent appealed the Memorandum of Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler on August 28, 1996.

**ISSUES**

The following three issues were raised by the respondent in its brief filed before the Appeals Board:

- "A. Whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent on May 10, 1996.
- "B. Whether the Administrative Law Judge exceeded his jurisdictional authority in ordering an examination by Doctor Carabetta prior to making a determination that claimant had met her burden of demonstrating personal injury by accident

arising out of and in the course of her employment on May 10, 1996.

- “C. Whether the Administrative Law Judge exceeded his jurisdictional authority by issuing a preliminary award of temporary partial disability compensation.”

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

- (1) The Administrative Law Judge found claimant had presented evidence at the preliminary hearing sufficient to establish that she injured her right knee while working for the respondent on May 10, 1996. Respondent argued claimant was not a credible witness and, therefore, claimant's request for preliminary compensation benefits should be denied.

Claimant alleged she injured her right knee on May 10, 1996, when she turned back to the counter and her right knee twisted as she avoided colliding with another employee. Claimant testified she sought medical treatment on her own the day of the injury at the Shawnee Mission Medical Center emergency room. She was seen in the emergency room by her family physician, Gerald D. Wigginton, D.O. Dr. Wigginton diagnosed a sprained right knee, placed claimant in a knee splint, and instructed her to use crutches for non-weight bearing. Dr. Wigginton advised claimant to follow up with an orthopedic surgeon. Claimant received further medical treatment from two orthopedic surgeons, William O. Hopkins, M.D., and Satish C. Bansal, M.D. Dr. Hopkins saw claimant on May 16, 1996, and took her off work. Dr. Bansal returned claimant to work four hours per day with no lifting more than 10 pounds from the floor and no more than 20 pounds at body level on June 12, 1996. Claimant was released by Dr. Bansal for work with no weight restrictions on June 24, 1996. However, as of the preliminary hearing, August 1, 1996, claimant had not returned to full-time employment with respondent.

Claimant was asked during the preliminary hearing whether she had a recent history of problems with her right knee prior to the May 10, 1996 accident. Claimant answered in the negative. However, medical records admitted at the preliminary hearing indicate when claimant was 12 years of age, or 8 years prior to the accident in question, claimant had a previous right knee injury. The Shawnee Mission Medical Center emergency record also indicated claimant gave a history of right knee pain for five days prior to her treatment on May 10, 1996, and the pain worsened at work. Claimant denied she told the emergency room personnel she had pain in the knee five days prior to her injury. Furthermore, the emergency room record and Dr. Wigginton's treatment record showed the claimant described that her right knee worsened when she twisted it at work. Claimant's supervisor, Melisa Tucker Vick, testified by deposition that she knew claimant had hurt her right knee

on May 10, 1996, but she did not know that the injury was work related until she learned the next day that claimant had reported the injury to another manager as work related.

The Appeals Board recognizes that claimant's testimony conflicts with the medical records to some degree. The Appeals Board is also mindful claimant described the mechanism of her accident consistently in those medical records. The Administrative Law Judge had the opportunity to personally observe and determine the credibility of claimant, who testified in person before him. In finding claimant sustained a work-related injury, the Administrative Law Judge had to determine that her testimony was credible. The Appeals Board finds some deference should be given to the Administrative Law Judge, in this instance, as he was able to personally assess the credibility of the claimant. Accordingly, after review of the whole preliminary hearing record, and giving due deference to the conclusions of the Administrative Law Judge, the Appeals Board affirms the Administrative Law Judge's order that claimant's right knee injury arose out of and in the course of her employment with the respondent.

(2) The Workers Compensation Act grants the Administrative Law Judge specific authority to appoint a neutral physician to examine the injured employee. See K.S.A. 44-516. In this case, the Administrative Law Judge did not order such an examination until he found claimant had proved she suffered a work-related accidental injury. The Appeals Board has previously held the decision of the Administrative Law Judge to have an independent medical examination performed on the claimant and to assess the costs of such examination to the respondent is interlocutory in nature and made during the litigation of workers compensation case. This is not a final order that can be reviewed pursuant to K.S.A. 44-551, as amended. Neither is this an order entered pursuant to the preliminary hearing statute, K.S.A. 44-534a, as amended, as preliminary orders are limited to issues of furnishing medical treatment and payment of temporary total disability compensation. This issue pertains to an interlocutory matter, ordering an independent medical examination, over which the Administrative Law Judge has the authority to order during the litigation of a workers compensation case. See James R. Winters v. GNB Battery Technologies, Docket No. 198,938 (September 15, 1995).

(3) The Administrative Law Judge ordered respondent to pay claimant temporary partial disability benefits. Respondent argued the preliminary hearing statute only authorized the Administrative Law Judge to order the respondent to pay temporary total disability compensation and not temporary partial disability compensation. The respondent does not question the Administrative Law Judge's authority to order temporary partial compensation when the injury is a scheduled injury set forth in K.S.A. 44-510d.

The Appeals Board has previously addressed this issue, holding the Administrative Law Judge has the authority to enter a preliminary hearing order for payment of temporary partial disability compensation. See Verna K. Brown v. Lawrence - Douglas County Board of Health, Docket No. 205,848 (March 29, 1996). Accordingly, the Appeals Board

concludes it does not have jurisdiction to review this issue at this juncture of the proceeding.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Memorandum of Preliminary Decision entered by Administrative Law Judge Robert H. Foerschler dated August 28, 1996, should be, and is hereby, affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October, 1996.

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BOARD MEMBER

c: C. Albert Herdoiza, Kansas City, KS  
D'Ambra M. Howard, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director